FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

REPLY BRIEF FOR THE APPELLANTS

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(continued)

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TABLE OF ABBREVIATIONS

For purposes of reference in the text, we shall designate the several briefs in this case as follows:

"T." – Appellant Teachers' Main Brief, filed July 9, 1976

"U." – Appellees' Brief, filed September 10, 1976

"N." – Brief *Amicus Curiae* of the National Education Association (NEA), filed September 14, 1976

"X." – Joint Brief *Amicus Curiae* of the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) and the United Automobile Workers (UAW), filed October 15, 1976*

*We identify this *amicus* brief with the letter "X", traditionally used to designate "the unknown quantity", because we recognize that it was untimely filed, and therefore may not be considered at all by this Court. We have *not* opposed its filing, however, and have attempted to deal with the arguments it presents in so far as we were able in the limited time the joint Amici saw fit to give us.

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SUMMARY

The Appellees and their Amici ask a great deal of this Court.

1. They urge the Court to abdicate its function as guardian of the Constitution in favor of an "administrative procedure" hastily formed by the Appellee Union to "reimburse" the dissident Teachers for the violations of their constitutional rights which, the Union admits, are bound to occur. It is indeed so. All concerned agree that the agency-shop authorized by the Michigan Public Employment Relations Act ("PERA") on its face abridges the Teachers' constitutional rights. The other side goes so far as to assert that the Michigan Court of Appeals actually gave judgment in favor of the Teachers on this point, so that the Teachers really have no ground for this appeal! Obviously our opponents are confusing dictum with judgment. It may suit their purpose to do so; but it nevertheless does not accurately describe this case. In fact, the court below affirmed the dismissal of the Teachers' constitutional claims; and when it did so, no matter how it garbled the result, the Michigan court legitimized the abridgment of the Teachers' constitutional rights. Presumably that is why this Court took jurisdiction of the case – and why it alone is competent to dispose of it. The Constitution of the United States, and the constitutional rights and claims of the Teachers, are not for the Union's "rebate procedure" to expound and defend. *See* Part I.C., *infra.*

2. Appellees and their Amici also ask the members of this Court to suspend the operation of their judicial and ratiocinative faculties. They attempt to induce the Court undiscriminatingly to follow a pair of decisions which are materially distinct from the present case and which were decided within a framework of legal principle inapplicable here. *See* Parts II. and III.B., *infra.* At the same time they ignore the powerful line of unconstitutional-conditions decisions upon which the Teachers have grounded their case

from the beginning. *See* Part III.A., *infra.* They go so far, indeed, as to contend that public employers are as free of constitutional restraints as private employers are – quite possibly one of the most extreme examples of throwing the baby out with the bath that ardent advocacy has presented in a long while. *See* Part III.C., *infra.*

3. Appellees and their Amici unions apparently underrate the Court's memory as much as they do its powers of discrimination. They refer at considerable length to a number of decisions last term which bear only tangentially on this case – and then not in the way that Appellees suggest. But at the same time they omit all reference to a decision handed down late last term that is practically on all fours both factually and analytically with this one. Needless to say, that decision, *Elrod v. Burns*, 96 S. Ct. 2673 (1976), is strong if not conclusive authority for the Teachers. *See* Part IV.A.-C., *infra.*

4. We have saved for last the greatest weakness in our opponents' briefs: their utter failure to establish any kind of acceptable defense for the abridgment of constitutional right which, they concede, has occurred and will continue to occur. A strong – or powerful – or overriding – or paramount – or compelling *public interest* is all that will save state-action which merely impinges upon, let alone abridges, First-Amendment rights. Scores of decisions leave no doubt on this point. And yet neither Appellees nor their Amici have made anything like a serious attempt to demonstrate a *public* interest served by the admittedly unconstitutional statute here involved. They have been so concerned to show how forcing the Teachers to finance public-sector bargaining will promote such bargaining – and compensate the Union for engaging in what it most wants to do – that they have forgotten to reveal how the public interest is served by either compulsory public-sector bargaining or abridging the Teachers' constitutional rights by forcing them financially to support the Union in such bargaining. *See* Part V., *infra.*

Of necessity, and as is only proper, the bulk of this reply concentrates upon the fallacies and distortions of the opposing briefs. We should ourselves be remiss, however, if in focussing attention upon those fallacies and distortions we failed to remind the Court of the simplicity and the strength of the Teachers' case, and of how far short Appellees and their Amici have fallen in their attempt to challenge it.

We contended and we believe we proved in our main brief that forcing the Teachers to provide financial support to the Union as a condition of employment abridges their rights under the First and Fourteenth Amendments. T. at 10 *et seq.* We went on to establish the existence of a consensus to the effect that public-sector collective bargaining is an inherently political activity, so that compelling the Teachers to support it becomes *a fortiori* unconstitutional. T. at 62-80. Appellees and their Amici have not only failed to rebut this contention; they have not even seriously attempted to meet it. *See* Part I.B., *infra.*

We did not stop there but went on to demonstrate that the compelled association here involved was in the constitutional sense absolute and indefensible. We emphasized that the invasion of the Teachers' associational, political, and speech-rights was direct and intended, not indirect and merely incidental to a valid and compelling public purpose; and that, therefore, this case presented a *per se* violation of the Teachers' civil liberties, one for which there was and could be no justification at all. T. at 81-115.

We completed the analysis by showing (a) that neither the Michigan Legislature nor the Appellees had advanced any public interest which might justify or even mitigate the abridgment of the Teachers' rights which has occurred in this case; and (b) that, on the contrary, the public interest is itself damaged in the course of the invasion of the Teachers' rights authorized by the Michigan Legislature and worked by agreement of the Detroit Board of Education and the Union. T. at 115-47, 147-86.

Our main brief concluded with a demonstration that the Teachers had standing to sue, that injunctive relief was the only proper relief in a case such as this, and that the precedents relied upon by Appellees and the court below against the Teachers were inapposite. T. at 199-214. Appellees have not really met these contentions at all. They have resorted in effect to a confession and avoidance by declaring that the Union's "rebate procedure" will cure the invasions of the Teachers' rights which are bound to occur under the agency-shop here involved.

We do not believe that this Court should or will countenance so blatant a subversion of the Teachers' civil rights and civil liberties.

ARGUMENT

I.

Despite the agreement of all concerned that the PERA agency-shop provision is unconstitutionally overbroad, and despite Appellees' failure to meet the Teachers' contention that public-sector collective bargaining is inherently political, the Union and the Board seek to induce this Court to endorse a procedure designed to vitiate, rather than to vindicate, the Teachers' First- and Fourteenth-Amendment rights.

The unique aspect of this case is that no serious arguments on behalf of the constitutionality of the PERA agency-shop have been presented to this Court. Rather, all concerned agree that the provision is unconstitutionally overbroad on its face – because (in the words of the Michigan Court of Appeals) as a matter of state law it clearly "sanctions the use of nonunion members' fees for [partisan-political] purposes" (A. 101). The only points of disagreement are two: *First*, between the

position of the Teachers that, because the statute is unconstitutionally overbroad, therefore its enforcement should be enjoined; and the position of the Michigan Court, Appellees, and their Amici that, although the statute is unconstitutionally overbroad, nevertheless it should be upheld because its infringements of the Teachers' First- and Fourteenth-Amendment rights may supposedly be "cured" by *ex post facto* awards of "restitution" or "rebates". *Contrast* T. at 200-14 *with* U. at 9-13, N. at 57-61, *and* X. at 11-13. *Second*, between the position of the Teachers that the overbreadth of the statute is pervasive, because of the inherently political nature of compulsory collective bargaining in the public sector; and the position of Appellees and the Amici that public-sector bargaining is indistinguishable from its private-sector counterpart, in so far as its political attributes are concerned. *Contrast* T. at 62-78, 164-76, *with* U. at 31-40, N. at 49-57, *and* X. at 28-31.

In this Part we shall expose the fallacies and perversities in these assertions of Appellees and their Amici.

A.

The Union, the Board, the Teachers, the Amici, and the Michigan Court of Appeals all agree that the PERA agency-shop scheme is unconstitutionally overbroad.

No one denies that the Michigan Court of Appeals squarely held, as a matter of statutory construction under Michigan law which is binding here, that: (i) the PERA agency-shop provision *"does not limit"* the uses to which the Union may put coerced fees, and *"sanctions"* the expenditure of those fees for "political activities"; and (ii) unlike the Railway Labor Act, which this Court interpreted in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), so

as "to deny railroad unions the right, over the employee's objection, to use his money to support political causes which he opposes", the PERA agency-shop "statute * * * *admits of no such construction"* (A. 101) (emphasis supplied). *See* U. at 10; N. at 57; X. at 14. Neither does anyone deny, as the Michigan court noted, that "[t]he [partisan] political activities of unions are well-recognized", or that "[i]t is reasonable to assume that at least a portion of every union's budget goes to * * * support of candidates sympathetic to the union cause and lobbying for the passage of bills in the legislature" (A. 101). Indeed, by belatedly injecting into this case its so-called "administrative rebate procedure", the Union brazenly represents to this Court its intention anticipatorily to invade the Teachers' First- and Fourteenth-Amendment freedoms, in (as we shall show) an irremediable fashion, precisely by expending their agency-fees for "activities or causes of a political nature or involving controversial issues of public importance".[1] U. at 11; *cf.* N. at 57 n.18; X. at 11 & n.4.

What Appellees, their Amici, and the Michigan Court do deny, however, is that such spending, *in and of itself*, is unconstitutional, and that, therefore, the statute which empowers the Union to engage in it is also unconstitutional *per se*. But these denials are frivolous. The Teachers do not complain that the agency-shop merely deprives them, for some length of time, of the use and enjoyment of monies, a right to the possession of which the Union has not been required to, or cannot, establish. *Contrast Sniadach v. Family Finance Corporation*, 395 U.S. 337, 343 (1969) (Harlan J., concurring). The Teachers' claim is not concerned, in any

[1] Appellees tell the Court that this procedure is provided in "bylaws recently adopted" by the Union. U. at 11. What they do not say is that these new bylaws were not adopted until June 3, 1976. *The Detroit Teacher*, Sept. 28, 1976, at 7, col. 1. Apparently the Union finally realized the desperate state of its case *after* this Court noted probable jurisdiction on April 26, 1976. 96 S. Ct. 1723.

dispositive sense, with mere property interests. Rather, their claim asserts that, when the Union expends agency-shop fees coerced from them under color of state law in support of its political and ideological activism, *that spending, in and of itself*, abridges their First- and Fourteenth-Amendment freedoms of speech and association, and their political autonomy (A. 13-14, 48-50) – because, in Mr. Justice Brennan's words, any such "assessment of [a public employee's] salary is tantamount to coerced belief". *Elrod v. Burns*, 96 S. Ct. 2673, 2681 (1976). Thus it is the *spending* which creates the unconstitutional prior restraint upon their freedoms, of which the Teachers complain. And it is the *spending* of their confiscated monies which the Teachers seek, and are entitled, to have arrested by an injunction against enforcement of the PERA agency-shop scheme.[2]

Therefore, the argument of Appellees and their Amici, that the decision of the court below has afforded the Teachers all the relief to which they are entitled, is specious and disingenous. *See* U. at 10; X. at 11; *cf.* N. at 57-58. The decision holds that dissenting Teachers who "protest" to the Union the unconstitutional expenditure of their agency fees may (under some undefined conditions) receive "restitution" of the illegally spent monies – but may *not* have enforcement of the agency-shop itself enjoined (A. 103-04). Since, however, the spending *is* the constitutional violation, irrespective of whether the illegally spent money is returned, the existence of a scheme for "restitution" of part or all of the fees is beside the point. "Restitution" could be required only *after* such rights have been abridged. But *after* the rights have been abridged, the damage is done, and cannot be

[2] It would be nonrational and unjust in this case for the injunction merely to prohibit *spending* of the agency-fees, and not their *collection* as well. If only the spending were enjoined, the Union could still proceed to collect monies to which it was not entitled, requiring the Teachers to initiate yet another lawsuit to secure their rightful *property* interest in their own wages.

repaired. *See Elrod*, 96 S. Ct. at 2689-90 & n.29 (opinion of Brennan, J.).

In short, the "right" to "restitution" which Appellees so misleadingly assert on pp. 10-11 of their brief as now "recognized by Michigan * * * and preserved by the governing rules and bylaws of the Union itself" is a "right" the recognition of which does not "avoid" the violation of the Teachers' First- and Fourteenth-Amendment liberties worked by the agency-shop. Rather, it ignores the issue central to this appeal. The statute *sanctions* unconstitutional political spending at the option of the Union. The spending causes *irreparable* injury to the Teachers. Therefore, even if it also sanctions constitutional spending by the Union (which the Teachers deny), *the statute* is unconstitutional, and its operation enjoinable, on grounds of overbreadth – whether the Union "rebates" the coerced fees or not.

And thus, the real issue here being the unconstitutional Union spending sanctioned by the PERA agency-shop, Appellees' case utterly collapses. For they have not made, and could not honestly make, an attempt to justify a statute which permits the Union to extract "forced loans" from dissenting Teachers, to apply these "loans" to political and ideological activism, and then to demand that *the oppressed Teachers* "protest" their own oppression before a tardy and inadequate "rebate" is offered to them.

Yet, while the Teachers must prevail on the overbreadth issue, the importance of this case (as evidenced by the indefatigable attempts of Appellees and their Amici to disguise, distort, and draw attention away from the real issue *sub judice* here) compels us to answer other of their arguments bearing on the "political-spending" question. And to these, we now turn.

B.

The inherently political character of public-sector collective bargaining, established by the Teachers and ineffectively challenged by Appellees, makes injunctive relief the uniquely appropriate remedy in this case.

There is no need to add further documentation to the Teachers' exhaustive demonstration that public-sector collective bargaining is an *inherently political* process. T. at 63-76. Rather than seriously contesting this conclusion, Appellees have sought merely to avoid its impact through the most transparent of double-talk. Appellees' main ground for contending that public-sector collective bargaining is *not* inherently political seems to be that all the highly qualified persons who have asserted that public-sector bargaining *is* inherently political nevertheless favor it. U. at 36-39. The rational relationship between these two propositions completely escapes us. It is the same as saying that because many experienced smokers agree that a cigarette has a fine taste, it is therefore not dangerous to health.

But let Appellees speak for themselves, as when they claim that "[f]ar from characterizing the public employee union's bargaining as political, Professor Summers views the process as necessary to counteract the political pressure upon the *other* party at the bargaining table". U. at 38. As if a set of special statutory privileges which enables the Union "to counteract * * * *political* pressure" is not *ipso facto* a grant of peculiar *political* influence; and as if Professor Summers himself had not noted, *in a passage which Appellees themselves quote with approval*, that "[i]ntroduction of collective bargaining into the public sector alters the governmental process"! U. at 38 n.30. Apparently, Appellees would have this Court understand that a system which *they admit* affords unions special *political* power, and fundamentally alters the *governmental* process, is (notwithstanding these effects) neither

political nor *quasi*-governmental in character – because *they* prefer to call it "bargaining", in furtherance of their desire to discourage constitutional scrutiny of the agency-shop. Here, surely, is an attempt at "labelling" even more impermissible than those others which this Court has uniformly rejected in the past. *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 433 (1830).

Amicus NEA at least tries to challenge the Teachers' conclusion that public-sector bargaining is inherently political. N. at 49-57. The Amicus correctly notes that, in *Street*, this Court distinguished between partisan political activity (such as lobbying and electioneering) and collective bargaining under the Railway Labor Act. 367 U.S. at 768-69 & n.17. But the *Street* majority did not thereby establish an abstract and absolute dichotomy between "political action", on the one hand, and "collective bargaining", on the other. It merely applied the obvious distinction between Union activity directed towards influencing and controlling *government*, and activity directed towards influencing and controlling *private employers*. In *this* distinction, the Teachers readily concur – because their case rests upon the logical impossibility of distinguishing *government* as the embodiment of the political process from *government* as a participant in an imaginary nonpolitical process of collective bargaining. *Government*, after all, is inescapably a – indeed, *the* – *political* entity, exercising *sovereign* (not "private", or "economic") authority even when it deals with mundane matters of setting wages and hours for its employees. *See National League of Cities v. Usery*, 96 S. Ct. 2465 (1976). Nothing can change this fact, or the implications it has for constitutional law, even if (as the NEA asserts) "[t]he cause which has led to the formation and growth of public employee unions is identical to that which prompted the organization of private sector workers". N. at 53. For it is not how *unions* view public (and private) employers which determines how the Constitution should apply to the activities of those employers, but instead

how *the Constitution* limits (or fails to limit) the freedom of public (and private) employers in dealing with unions which determines how far those employers may go in permitting unions to coerce ideological conformity among nonunion employees. In short, the NEA conveniently forgets that there is an unalterable constitutional distinction between private and state-action. But to forget *that* distinction is to beg the fundamental question raised by this appeal. T. at 10-62.

Nevertheless, if Appellees and their Amici cannot see, or refuse to admit, the inherently political nature of public-sector bargaining, others are less myopic, or less stubborn. We have already pointed out that the Michigan Supreme Court views public-sector collective bargaining in that state as inherently political. T. at 65-66. More recently, in *City of Stamford*, Case No. MPP-3381, Dec. No. 1421 (1976), the Connecticut State Board of Labor Relations also held that

> "[t]here is a political aspect of collective bargaining in the public sector that has no counterpart in private bargaining." *City of Hartford* (Police and Fire), Case No. MPP-3117, Dec. No. 1353 (1975). See also *City of Shelton*, Case No. MPP-2946, Dec. No. 1344 (1975). So far as the cost of a bargain goes, the [Municipal Employee Relations] Act itself puts the ultimate control of the purse strings in the people through their elected representatives. * * * What this means is that the final phase of the collective bargaining process will often be left to the political process where (as here) the chief bone of contention is the cost of meeting (or partly meeting) union demands.
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> * * * * *
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> We clearly recognized in the *Hartford* case that "the way to counteract [unfavorable statements by a legislator] is by political means" and that public employees must put up with public attitudes in a democracy "if the employees cannot change the attitude by political means." If the people control the purse strings in the last analysis then it is part of the bargaining process to try to persuade the people to loosen them and under our system this is done through the ballot – by voting for officials and legislators who will be more likely to accede to or compromise with union demands.
>
> From this it follows that political activity may well be an integral part of the bargaining process. It is so where it is directed toward the election of officials and legislators who are thought to more (or less) be favorable to union demands in pending labor negotiations. When political activity is of this kind it is among the "concerted activities for the purpose of collective bargaining" which employees have the right to engage in "free from actual interference, restraint, or coercion."

But if, as the Connecticut Board held, such partisan, electoral "political activity may well be an integral part of the bargaining process", what rational distinction remains between public-sector "bargaining" and "politics"? How can a category of *nonpolitical* public-sector bargaining be defined?

We submit that such a category is logically nonexistent. And therefore, *all* coerced financial support of a union engaged in public-sector bargaining is necessarily a violation of the First- and Fourteenth-Amendment liberties of dissenting employees, by hypothesis. That is, the overbreadth of the PERA agency-shop is, in the nature of things, *pervasive* and *incurable*. And such pervasive overbreadth can be attacked and remedied *only* by a sweeping injunction, invalidating the scheme on its face. For the alternative of a protracted case-by-case approach would only exacerbate the statute's inhibitory effect on First- and Fourteenth-Amendment liberty, even if it were reasonable (which the Teachers deny) to assume that, under some as yet undefined and extraordinarily narrow circumstances, the agency-shop might be applied in a permissible manner. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 372-79 (1964).

In sum, if Appellees wish to argue that, in some particulars which no observer has yet imagined, public-sector collective

bargaining is not political in character, the burden is on them and the Michigan Legislature to define those particulars with scrupulous care, and to enact and enforce only such statutory schemes of "union security" as are demonstrably limited to those particulars. This, they have not done. It is not the Teachers who should suffer continuous prior restraints upon, *inter alia*, their freedoms not to speak, not to associate, and not to petition simply because the Michigan Legislature has not seen fit even to attempt to enact a sufficiently precise and carefully tailored statute. Rather, it is the Union which should be denied the abusive and indefensible benefits of an overbroad infringement of the Teachers' rights, until it can teach that Legislature how to design a triangular square – a public-sector agency-shop scheme which passes muster under the First and Fourteenth Amendments. *See* T. at 87-93, 115-28.

C.

The "remedy" suggested by Appellees and the court below would exacerbate the existing invasion of the Teachers' First- and Fourteenth-Amendment rights.

Which brings us, finally, to the suggestion of Appellees and the Amici that, in the admitted absence of a narrowly drawn statute, a "remedy" of "restitution" or "rebate" for admitted violations of the Teachers' First- and Fourteenth-Amendment freedoms will suffice. We can but wonder at the contempt in which this suggestion holds the long and unbroken series of decisions of this Court which teach that First-Amendment rights, above all others, must be afforded the most unstinting and uncompromising protection, whatever the price. For what is suggested here, bluntly put, is that this Court simply *disregard* the admitted unconstitutionality of the PERA agency-shop, because otherwise the complete vindication of the Teachers' First- and Fourteenth-Amendment rights might prove too financially costly to the Union.

Appellees, for example, preposterously assert that the Michigan court actually "upheld" the Teachers' rights because its suggested "remedy" of "restitution" "clearly bars the political use over their objection of appellants' agency shop payments". U. at 10 (footnote omitted); *accord*, X. at 11. In reality, the "remedy" of "restitution" assumes that the Union *will* expend the Teachers' agency-fees for illegal "political uses", *not* that such spending will be "barred". *It assumes the existence of the constitutional violation*, and then meekly "penalizes" the Union by requiring it – *if* the Teachers make a sufficient "protest" – to disgorge the "forced loan" it earlier coerced from them. *See* A. 103-04. But it in no way addresses the *irreparable* injury caused by the promulgation of ideas, the promotion of causes, the electioneering for candidates, the mobilization of legislative forces, and the purveying of other official influence on which the Union may expend the Teachers' agency-fees. T. at 206-14. What sort of "remedy" is this, then? The very sort of "remedy" which this Court unequivocally indicated in the *Miami Herald* case "fails to clear the barriers of the First Amendment". *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Amicus NEA argues (even more fallaciously) that the Michigan court's "restitution remedy" has "provided a way in which the unconstitutional application of the statute [can] be severed". N. at 58. Besides distorting beyond recognition what the Michigan court really held in this case, this statement simply reads the "overbreadth-vagueness" doctrine out of constitutional jurisprudence. *Contrast Baggett v. Bullitt*, 377 U.S. 360, 372-79 (1964). And the NEA's further conclusion (with which Appellees and the other Amici agree) that the "restitution remedy" is a "determination of state law" which this Court must blindly follow truly borders on the absurd. N. at 60-61; U. at 10 & n.8; X. at 11-12.

Three questions were before the Michigan Court of Appeals. *First*, does the PERA agency-shop provision, as a matter of *state* law, place any limits on union spending of

coerced agency-fees? To this question, the court responded that the statute does *not* prohibit, but rather *sanctions*, union partisan-political spending (A. 101). *Second*, does union partisan-political spending of agency-fees, as a matter of *federal* law, violate the Teachers' *constitutional* rights? To this question, the court responded with the Delphic utterance that "the agency shop clause * * * could violate plaintiffs' First and Fourteenth Amendment rights" (A. 102). *Third*, what is the proper remedy, as a matter of *federal* law, for the violation of *federal constitutional* rights sanctioned by the PERA agency-shop? And to this question, the court responded that "restitution" affords sufficient relief (A. 103-04). Thus, the Michigan court opined that "restitution" is a "remedy", not for a violation *of the agency-shop statute*, but for a violation *of the federal Constitution.* The "relief" it fashioned was directed towards securing *federal* rights, not any rights which exist only under state law. Therefore, contrary to Appellees' contention, this Court is not bound to give *any* deference to the Michigan court's decision on the "remedy" issue. On the one hand, if that decision is taken as an interpretation of what state law permits as the sole available means to vindicate federal rights, the Appellees' contention flies in the face of the Supremacy Clause. U.S. Const. art. VI, cl. 2. This Court need not slavishly follow state law when that law purports to declare the unique mechanism by which federal rights can be preserved – or, as here, eviscerated. *E.g., Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). On the other hand, if (as we believe is the better view) the Michigan court's decision is taken as a misapplication of the principles of federal *statutory* law enunciated in *Street* to a probelm of federal *constitutional* law not present in that case, the Appellees' contention flies in the face of Article III. This Court is not bound to follow faulty constructions and applications of its own decisions by the state courts. *E.g., Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 621 (1936) (Hughes, C.J., dissenting).

Moreover, even if the "restitution remedy" were a binding determination of state law, it would not rule this case – since (as we have already shown) the "protest" requirement and "restitution" scheme themselves constitute prior restraints as invasive of the Teachers' First-Amendment rights as the unconstitutional spending they are proferred to "cure". T. at 87-93, 209-10. Furthermore, the "protest" requirement and "restitution" scheme suffer from an even more fatal defect. No one denies that it is unconstitutional for the Union to expend coerced agency-fees on partisan political activities. What *legitimate* state interest, then, justifies a statute which *sanctions* the collection and expenditures of those fees *for unconstitutional purposes*, and in addition requires the victims of this oppression to "protest" *to their oppressors* as a precondition to the return of monies *which should never have been seized and expended in the first place*? What "rational basis" exists for imposing upon the Teachers, not only these burdens, but also the concomitant financial costs of asserting the "rights" to "protest" and to receive "restitution" in the Michigan courts? None, we submit. The state has no *legitimate* interest in conditioning the Teachers' public employment on their acquiescence in such a system of prior restraints, presumed "waivers" of constitutional rights, and financial penalties for asserting freedoms which our Constitution holds beyond all infringements. *See, e.g., Elrod v. Burns*, 96 S. Ct. 2673, 2682-83 & n.13 (1976). For that reason alone, the agency-shop (even with the "remedy" of "restitution") fails to satisfy the "mere-rationality" requirement of the Due Process Clause of the Fourteenth Amendment. *Cf., e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934).

The Union and its Amici, however, are not satisfied with merely manifesting their contempt for the logic and teaching of the First Amendment. No; having drunk too long and too deeply at the legislative well-spring of special privilege, they incautiously dare to attempt to deceive this Court into

granting them prerogatives still more abusive and indefensible than they now enjoy under the PERA agency-shop. We refer, of course, to the argument that the Teachers should be required to submit themselves to the Union's internal "administrative rebate procedure" *as a precondition to the assertion of their own federal constitutional rights.* U. at 11-12; N. at 57 n.18; X. at 11 & n.4. How (in good faith) Appellees can advance this argument when, later in their brief, they claim that "the agency-shop allows the employee only to pay his pro-rata share without actually becoming a union member and subjecting himself to union rules and discipline", we cannot understand. U. at 21. Perhaps they have mastered the technique of "doublethink", whereby one holds two mutually contradictory ideas simultaneously in mind, believing both of them to be true. Or perhaps they mean only that the Teachers need not become union members and subject themselves to union rules and discipline except in so far as they desire to preserve their First-Amendment freedom from coerced political and ideological conformity. In any event, their argument proves what we have contended all along: namely, that the logic of the agency-shop, if carried to its full extension, requires dissenting employees to submit themselves, *and their basic liberties*, to union dictation. T. at 105-10. Indeed, what have we here except the strident voice of special privilege denouncing the liberties of those "nonpersons" who thwart its political designs, and demanding power to expose the Teachers' freedoms to the tender mercies of the very organization which broadcasts its intention to violate those freedoms?! If this be the appropriate "remedy", perhaps the Teachers would be well-advised to suffer the disease.

II.

This case is factually distinct from *Hanson* and *Lathrop* and therefore may not be ruled legally or constitutionally by those decisions.

Having conceded that the agency-shop provision is unconstitutionally overbroad, Appellees and their Amici nevertheless try to salvage the scheme by arguing that this case is somehow ruled by *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Lathrop v. Donohue*, 367 U.S. 820 (1961), and that these decisions are somehow adverse to the Teachers' position. In *Hanson*, the Court refused to hold unconstitutional on its face the agency-shop authorization of the Railway Labor Act, §2, Eleventh. In *Lathrop* the Court refused to hold unconstitutional on its face a Wisconsin requirement that all members of the Wisconsin Bar contribute financial support to the bar association (an "integrated bar").

We propose in this Part to reiterate the sharp and material factual distinctions between this case and those. This case falls between *Hanson* and *Lathrop*. Whereas *Hanson* involved *private* employment, this case involves *public* employment; and, Appellees' asseverations to the contrary notwithstanding, an instructed person cannot contend in good faith that there is no substantial, significant, and material distinction between the two types of employment. Again, whereas *Lathrop* involved state-action compelling *lawyers* to support an *agency of the State of Wisconsin* as part of their duty to the judicial system, this case involves state-action compelling *public-school teachers* to support a *private-association* as a condition of employment; and, once again, no competent person can in good faith hold that *these* distinctions are insubstantial, insignificant, or immaterial.

We believe that we have anticipated in our main brief all the contentions of Appellees and their Amici which are based upon *Lathrop*. *See* T. at 51-56, 103-04, 175-76. We do wish

to reëmphasize, however, that comparisons between lawyers as public officers and the Teachers as public employees cannot advance rational constitutional discussion in this case. *Pace* X. at 26-28. As officers of the courts, lawyers were highly regulated in their professional "associational" activities prior to 1791, as they have been since. Therefore, the freedoms secured to them on that date by the First Amendment *may* be somewhat narrower than (and certainly are different from) those which other citizens enjoy as mere employees of our public-school systems. *See, e.g., Theard v. United States*, 354 U.S. 278, 281 (1957); *Nebraska Press Association v. Stuart*, 96 S. Ct. 2791, 2823 n.27 (1976) (Brennan, J., concurring); *In re Sawyer*, 360 U.S. 622, 646-47, 665-69 (1959) (Stewart, J., concurring; Frankfurter, J., dissenting). (In any event, a judgment on the matter would require a careful historical investigation of the common-law status of the legal profession prior to the adoption of the Bill of Rights, together with a painstaking comparison-contrast analysis of that status to the status of public employees, both of which are out of place here.)

Moreover, the bar has always functioned subject to control and discipline by the judiciary itself. Bar associations, in so far as they fulfill public duties which justify compulsory membership, are not and have never been autonomous, self-regulating entities with independence anything like that exercised by contemporary public-sector unions from supervision by the employers of their members. To speak of "compulsory association" with the bar, then, is to forget that the position of an attorney, as an officer of the court, presumes "membership" in the judicial system – one part of which may be the bar association. *Cf.* J. Dawson, *The Oracles of the Law* 34 *et seq., esp.* 42 *et seq.* (1968).

Public-sector teacher-unions, in contrast, are not integrally related to the school boards and other official bodies for whom the teachers work. Rather, they are private, special-interest organizations, claiming a status separate from and

independent of the government. Therefore, it is valid to speak of "compulsory association" with such unions, since the position of a public-school teacher does *not* presume any connection to any private organization.

In short, this case can and should be decided without particular reference to the complicated problem so unsatisfactorily addressed in *Lathrop*. Once the controlling distinctions of fact and law between that case and this one are seen, the basic irrelevance of *Lathrop* to our situation becomes apparent.

We have also dealt at length with *Hanson* in our main brief. T. at 187-99. None the less, in view of the virtually total reliance of Appellees and their Amici upon that case, it seems desirable to reconsider their contentions and to recapitulate ours. Part III.B., *infra* p. 24.

III.

Appellees' unsupported assertions to the contrary notwithstanding, the constitutional distinction between public and private employment is basic, a vital feature of our legal system, and crucial to a proper disposition of this case.

One of the more astounding propositions advanced in Appellees' brief is that public employers share with private employers the constitutional liberty to condition employment contracts at will. Neither Appellees nor their Amici apparently are embarrassed by the fact that in order seriously to advance this proposition it is necessary studiously to ignore, among other bold features of American constitutional law, one of the most significant lines of cases developed by this Court during the past generation: the cases establishing the unconstitutional-conditions principle. *See* Part III.A., *infra* p. 23.

Appellees and the Amici seek to compensate for their disregard of the unconstitutional-conditions cases by the overwhelming emphasis they place upon *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). *Hanson* refused to invalidate a federal statute permitting private employers to make agency-shop agreements. It is distinguishable from the present case on several grounds – *e.g.*, private employment was involved in *Hanson*, while here a public employer is involved. However, Appellees and the Amici insist that *Hanson* rules the present case despite that fundamental distinction, and in spite of other differences between the cases. *See* Part III.B., *infra* p. 24. What matters, they say, is that the Court found "state-action" in *Hanson*. If, notwithstanding the presence of state-action in *Hanson*, the agency-shop was upheld, then the agency-shop involved in the present case must likewise be upheld, according to Appellees. The problem with this argument, of course, is that besides overlooking certain features of *Hanson* which should not be disregarded, it pushes the holding of *Hanson* to a point which makes it necessary for this Court to overrule either *Hanson* or its unconstitutional-conditions cases. For the Court may not rationally hold *both* that public employers may *not* condition employment on a waiver of constitutional rights – *and* that public employers *may* condition public employment on a waiver of the right not to join or support unions. We repeat here in Part III.B. the suggestion made in our main brief: the only way to reconcile *Hanson* with the unconstitutional-conditions principle is to confine *Hanson* narrowly to its facts, as Justice Douglas, the author of *Hanson*, suggested in his dissenting opinion in *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961).

We respectfully submit that if *Hanson* is not distinguished, and a choice must be made between *Hanson* and the unconstitutional-conditions principle, the latter must be preferred. The consequences of destroying the constitutional distinction between private and public employment, between

the conduct of private persons and that of agencies of the state, would be far-reaching and shattering; those consequences would indeed replace our hopes for a system of ordered liberty with a meaningless choice between chaos and tyranny. *See* Part III.C., *infra* p. 27.

A.

Appellees continue to ignore the unconstitutional-conditions doctrine and to assert with no support in either reason or authority that there is no constitutional distinction between public and private employment.

We observed in our main brief how scrupulously Appellees had avoided any reference to the Court's unconstitutional-conditions decisions. T. at 34-35. They, together with the NEA, persist here in that remarkably silent posture. Not a single reference to any of the unconstitutional-conditions cases is to be found in either of their briefs. One would suppose if his reading were limited to those briefs that this Court had never ruled that public employment may not be conditioned on a waiver or surrender of any right protected by the First and Fourteenth Amendments. The long, strong line of cases from *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Wieman v. Updegraff*, 344 U.S. 183 (1952), to last term's decision in *Elrod v. Burns*, 96 S. Ct. 2673 (1976), has apparently been relegated by Appellees and the NEA to the class of obsolete and irrelevant decisions.

Our opponents have chosen instead to advance the entirely anomalous contention that there is *no* constitutional distinction between public and private employment. *See, e.g.*., U. at 14 *et seq.* We evaluate the implications of this contention in Part III.C., *infra* p. 27. Here we emphasize that neither Appellees nor the NEA make any attempt to justify their disregard of the basic constitutional distinction between governmental and private action. They offer neither reason

nor authority: only *ipse dixit.* But that is not enough to ground a revolutionary result – for the abandonment of the constitutional distinction between state-action and private action would indeed radically revise American political and legal institutions.

Their purpose in proposing the abandonment of the distinction is not hard to discern. Appellees and the Amici wish to avail themselves of *Railway Employes' Department v. Hanson,* 351 U.S. 225 (1956), and its holding that the Railway Labor Act was not unconstitutional on its face in permitting private railway companies to make financial support of unions a condition of employment. Although we dealt thoroughly with *Hanson* in our main brief, and though Appellees and the Amici have said nothing about the case that we had not already noted, their virtually total reliance upon *Hanson* makes it necessary for us at least briefly to consider their arguments anew. And to that task, we now turn.

B.

Appellees rely on a private-sector case – *Hanson* – as authority for the constitutionality of the agency-shop in public employment, notwithstanding that *Hanson* refused to uphold the constitutionality of the agency-shop unequivocally even in private employment.

Appellees and the Amici contend that *Hanson* settled all the issues here. U. at 18-23; N. at 16-25; X. at 19-20. However, as we have demonstrated at considerable length in our main brief, *Hanson* did no such thing. *See* T. at 187-99. Stretched to the limit, the holding there was only that §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970), was not unconstitutional on its face in so far as it merely *permitted private employers* to condition employment on the payment of agency-shop fees to certified unions.

We recognized that the Court found "state-action" of a sort in *Hanson.* T. at 193-94.[3] We pointed out, however, that there is an obvious distinction between a case involving only the *Railway Labor Act,* which merely permits private employers to do what they had a perfectly clear common-law right to do, and a case such as this in which: (a) a statute authorizes *state* employers to make financial support of a union a condition of employment; and (b) the public employer proceeds to threaten with discharge all public-school teachers who refuse to associate with the union in any form, including by way of payment of agency-shop fees. T. at 13-15, 191-94.

Such "state-action" as was at issue in *Hanson* did not impair any *constitutional* right to private employment free of any obligation to join or support a union as a condition thereof. In short, while there might be doubt in some states about the *legality* of compulsory unionism agreements at common law, there was no question of their *constitutionality.* T. at 13-15. Even the most extreme form of compulsory unionism, the closed shop, was invulnerable to constitutional attack in private employment. *Id.* Thus for Congress simply to "permit" private employers to condition employment in the private sector on a *milder* requirement could raise no issue *under the Bill of Rights.* It could, however, raise a question concerning the relations between Congress and the State of Nebraska, the state in which the case arose, because Nebraska had forbidden all forms of compulsory unionism. We therefore suggested in our main brief that it would be best all around to view *Hanson* as an application of the Supremacy Clause of the United States Constitution – as a consistent example of the pre-emption decisions which the Court was handling down in the 1950's. T. at 194-95.

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[3] Amici AFL-CIO and UAW quote us as having suggested that "*Hanson* 'is [solely] a pre-emption case' ". X. at 20 n.8. As in a number of other instances in the briefs on the other side, this is an incorrect account of our position. *Cf.* T. at 194.

That suggestion still seems sound. It is always best to avoid overruling decisions whenever possible. If *Hanson* is construed in the way that Appellees and the Amici demand, however, either it will have to be overruled, or the Court will have to create an anomalous exception to the unconstitutional-conditions principle. If *Hanson* is construed as validating the conditioning of public employment upon association with a union, it will be incompatible with all those decisions of this Court holding that public employment may not be conditioned upon a waiver or cession of rights under the First and Fourteenth Amendments – including a decision handed down as late as June, 1976: *Elrod v. Burns*, 96 S. Ct. 2673 (1976). *Cf.* T. at 21-61.

Appellees' reliance on *Hanson* is misplaced in another way. As our main brief points out, the author of *Hanson* and other members of the Court agreed that *Hanson* did *not* pass upon the constitutionality of all agency-shop authorizations even in the private sector. T. at 195-99. Justice Douglas said that "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case". 351 U.S. at 238.

Recognizing these facts about *Hanson*, even the court below refused to accept Appellees' contention that *Hanson* totally rules this case. According to the Michigan court, *Hanson* "did not consider whether or not funds collected pursuant to an agency shop clause could constitutionally be used for purposes unrelated to collective bargaining. That issue was not presented in *Hanson*, but it is squarely before us in the case at bar" (A. 100).

For two powerful reasons, then, *Hanson* may not properly be considered authority against the Teachers. In the first place, even though it might be considered a "state-action" case of sorts, it quite clearly did not have anything to say about the constitutional rights of public employees. In the second place, it expressly stated that if in authorizing the agency-shop in private employment Congress also authorized

unions to use agency-fees for political or ideological purposes, a serious constitutional question not presented by the *Hanson* record would have to be confronted. That the Court meant what it said is borne out by the device it utilized in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), to avoid the constitutional issue left open in *Hanson*. The Court in *Street* construed §2, Eleventh of the Railway Labor Act as not permitting the use of agency-fees for political or ideological purposes. T. at 195-99. In the present case the Michigan statute has been authoritatively construed as *permitting* the very kind of exactions which the Court in *Street* held *not permitted* by the Railway Labor Act (A. 101-02). Therefore, it is impossible to see how either *Street* or *Hanson* has anything to contribute to the disposition of this case.

C.

Negating the long-standing constitutional distinctions between state-action and private action and between public employment and private employment, as Appellees seem intent upon doing, would amount to a radical revision of the United States Constitution and of the premises upon which it is based.

Appellees and Amicus NEA have taken the position that there is no material distinction between private-sector and public-sector collective bargaining. U. at 31-40; N. at 49-57. Beyond that, they contend that public agencies enjoy the same freedom of action in the employer-employee relationship that private employers do. As far as Appellees and the NEA are concerned, the historic distinction between state-action and private action is without any real significance, and its abandonment of little moment.

We need not repeat here what we have said about this distinction in our main brief. No constitutional proposition is more firmly established than that "the state and federal

governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer". *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961). *See* T. at 10-17, 23-34. Appellees and the NEA are simply wrong, then, in asserting that since private employers are constitutionally free to enter agency-shop agreements, public employers must have the same liberty. This Court's unconstitutional-conditions doctrine stands as a monumental refutation of that fallacy. T. at 21-62. And the Court's decision late last term in *Elrod v. Burns* constituted a vote of confidence by *all* members of the Court, including the dissenters, in the continued vigor of the unconstitutional-conditions doctrine. 96 S. Ct. at 2682-85, 2690, 2693.

Abandoning the constitutional distinction between state-action and private action would produce momentous consequences. Consider some of them. Under the unconstitutional-conditions decisions of this Court – assuming they survived – private employers would be confined in the same way that public employers now are: they would be constitutionally disabled from conditioning employment in any way that would limit conduct of the kind privileged by the First and Fourteenth Amendments. The owner of a newspaper could not reserve employment to journalists who agreed to write as he ordered. A religious establishment could not employ only ministers who approved the doctrines it espoused.

Conversely, if Appellees and the NEA are correct in saying that private persons and states share identical status under the Constitution, then it would follow that whatever rights, powers, privileges, and immunities private persons have, governments also enjoy. So, since *under the Constitution* all private persons may admit or deny access to their private properties at will, it would follow under Appellees' conception that government agencies are similarly privileged. Likewise, since *under the Constitution* private persons enjoy freedom of contract – may, in brief, act as whimsically as

they wish in contracting or refusing to contract – it follows under Appellees' theories that governments too may whimsically choose to deal only with Democrats, or Baptists, or members of the white race, or conservatives, or socialists, or anyone else, as they please.

Still again, and still more paradoxically, if Appellees are correct in contending that there is no constitutional distinction between the privileges and immunities of private persons and those of governments, then since governments have the power to compel obedience to their laws, the power to tax, and even the power to draft the citizenry, it would follow that private citizens also have legal power to compel others to obey their mandates, to exact money contributions by force from others, and to force others to work for them.

Quite obviously, accepting the theories of Appellees and the NEA would make a shambles of the law and the Constitution of the United States. It would create a new juridical structure, one heretofore unknown, not only in America but in any legal order that ever existed or could exist.

IV.

Appellees have misunderstood *Letter Carriers, National League of Cities*, and certain other cases from last term that they have cited in support of their position, and have ignored the one decision late last term – *Elrod v. Burns* – which is directly in point and which constitutes overwhelming authority in favor of the Teachers.

One of the sure signs of a weak legal position is the use of inapposite precedents and the omission of apposite ones. Appellees' brief demonstrates this weakness. It spends considerable time on *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), and a number of other decisions handed down late last term and on *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). But it ignores *Elrod v. Burns*, 96 S. Ct. 2673 (1976), a case also handed down near the end of last term.

It would be inaccurate to say that *National League of Cities, Letter Carriers,* and the other decisions of last term upon which Appellees dilate have nothing at all to do with this case. On the contrary, those cases do relate in a material, through incidental, way to this one (a way, however, precisely contrary to Appellees' contention). *See* Parts IV.A. & IV.B., *infra.*

But the matter of large significance here is that while the cases Appellees emphasize have some minor relevance to this one, the case they ignore – *Elrod v. Burns* – is so close to this one in terms of both fact and constitutional principle that it seems just to describe it as "on all fours". Moreover, and this more than likely explains Appellees' attitude of *ignorabimus* toward the case – for we can scarcely believe that so able and conscientious a lawyer as Appellees' could have overlooked it – *Elrod v. Burns* powerfully reaffirms the vitality of the unconstitutional-conditions principle, is in some ways a weaker case for the public-employees involved than this one but still holds for them, and therefore makes the Teachers' case here an *a fortiori* one. *See* Part IV.C., *infra* p. 35. No wonder Appellees ignore it. They have prudently taken to heart Ludwig Wittgenstein's injunction: "Whereof one cannot speak, thereof one must be silent".[4]

A.

Appellees have misunderstood the relevance to this case of *National League of Cities* and the other decisions handed down late last term to which they refer.

Towards the end of last term, this Court handed down a number of decisions which, taken all in all, recognized a

[4] *Tractatus Logico-Philosophicus* §7.00 (1961 ed.) (also translated as "What we cannot speak about we must pass over in silence."). The original is: "*Wovon man nicht sprechen kann, darube muss man schweigen.*"

degree of autonomy in state and local governments as regards the formulation and administration of public-employment policies and practices. Appellees recount the following decisions, apparently regarding them as favorable to their position: *City of Charlotte v. Local 660, Fire Fighters,* 96 S. Ct. 2036 (1976); *Crestwood Education Association v. Board of Education,* 96 S. Ct. 3184 (1976); *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 96 S. Ct. 2308 (1976); *Kelley v. Johnson,* 96 S. Ct. 1440 (1976); *Board of Retirement v. Murgia,* 96 S. Ct. 2562 (1976); *McCarthy v. Civil Service Commission,* 96 S. Ct. 1154 (1976); *National League of Cities v. Usery,* 96 S. Ct. 2465 (1976); and *Vorbeck v. McNeal,* 96 S. Ct. 3160 (1976). *See* U. at 14-18.

Appellees have misunderstood the relationships between the foregoing decisions and the present case. Consider, for example, the decision in *National League of Cities v. Usery.* There this Court held that the 1974 amendments of the Fair Labor Standards Act were unconstitutional in so far as they purported to regulate the wages and hours of public employees in the states and localities. According to Appellees and the NEA, *National League of Cities* establishes the proposition that the states are free to do just about anything they wish so far as their employment relations are concerned. U. at 15, 36; N. at 28, 46.

But it is difficult to see how the meaning of *National League of Cities* could be distorted more egregiously. It does not follow from a holding against congressional invasion of state sovereignty over employment relations that the states are free of all restraints so far as those relations are concerned. Would Appellees contend that since *National League of Cities* the states are constitutionally authorized to restrict public employment only to blacks, or Baptists, or members of the Ku Klux Klan, or contributors to Common Cause, or union members, or such persons as agree not to join or support unions? How would Appellees apply *National League of Cities* to a state statute prohibiting union membership to all public

employees? Would it regard such a statute as immune to all constitutional review merely because *National League of Cities* has intimated that *Congress* could not pass such legislation for the states? *Cf. Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969), *and* T. at 34-46.

We respectfully submit that – contrary to Appellees' contentions – the decisions handed down late last term are burdened with powerful intimations *against* Appellees. Those decisions do indeed on the whole recognize considerable authority in the states to govern their own employment relations. That authority, the Court made clear, is implicit in the sovereign powers retained by the states. However, in emphasizing the continued sovereignty of the states over their own employment relations, the Court could not have intended to suggest that the states are authorized to delegate, dissipate, or squander that sovereignty at will. On the contrary, "sharing" their sovereignty over employment relations with unions is laden with constitutional issues of the gravest kind. *National League of Cities* holds that Congress may not invade that sovereignty. Do unions have a greater power than Congress to usurp the sovereignty of the states? *See* T. at 176-86.

Again, not a line in the decisions late last term may fairly be construed as abandoning or even limiting the unconstitutional-conditions principle which constitutes the basis of the Teachers' case. T. at 18. Each of those decisions harmonizes readily with the principle that no government in this country may condition public employment on a waiver of rights protected by the First and Fourteenth Amendments. The states and localities may to some degree enjoy immunity from *congressional* control. But all government in this country is subject to *constitutional* restraint. That is the meaning of constitutional government.

While recounting so many of the last term's decisions, Appellees did not see fit to mention *Elrod v. Burns*, 96 S. Ct. 2673 (1976), although it is practically "on all fours" with the present case. *See* Part IV.C., *infra* p. 35. The most notable

feature of *Elrod* lay in its reaffirmation of the unconstitutional-conditions principle. Adding it to the decisions which Appellees saw fit to notice, we get a clear message from the Court, one which may be phrased as follows: The states have sovereign powers and responsibilities in respect of their employment relations – powers and responsibilities which neither Congress nor trade unions may displace or usurp; however, those powers, like all governmental powers, must be exercised compatibly with constitutional restraints, especially restraints imposed by the Bill of Rights and the Fourteenth Amendment.

B.

Appellees have misunderstood the *Letter Carriers* decision and its relationship to this case.

In *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), this Court upheld the constitutionality of the Hatch-Act limitations on organized, partisan-political activities of federal civil servants. However, the case did not hold that the government might deny *all* political rights to civil servants. No one can reasonably doubt after reading the opinion that the Court would have invalidated any statute denying civil servants the right to vote, to join and support political parties, and to express their own opinions as individuals on all political issues. It goes equally without saying that the Court would have struck down the Hatch Act if it had made membership in or contributions to any political party a condition of federal employment. *See Elrod v. Burns*, 96 S. Ct. at 2689 n.28 (plurality opinion of Justice Brennan).

As noted in our main brief, *Letter Carriers* stands for the well established proposition that government may require civil servants to abide by all rules reasonably related to the functions they perform and to preserving the integrity of government itself. T. at 25, 114, 172-75; *cf. Washington v.*

Davis, 96 S. Ct. 2040, 2050-53 (1976); *see also* T. at 31-34. We are reassured in our interpretation of *Letter Carriers* by Mr. Justice Brennan's construction of it in *Elrod*. Referring to *Letter Carriers* and to *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), Justice Brennan said that "[i]n both of those cases, legislative restraints on political management and campaigning by public employees were upheld despite their encroachment on First Amendment rights because *inter alia*, they did serve in a necessary manner to foster and protect efficient and effective Government". 96 S. Ct. at 2686 (footnote omitted).

Appellees' reliance upon *Letter Carriers* is thus misplaced. U. at 17, 42-45. *Letter Carriers* might be regarded as authority for Appellees if they could prove that compelling the Teachers to support the Union would somehow enhance their performance as public-school teachers or better enable the public-school system to carry out its educational functions. In view of the sorry record of teachers' strikes in the period during which teachers' unions have expanded, and the less-than-flourishing condition of all heavily unionized school systems, it is difficult to see how Appellees could provide such proof. *Cf.* Public Service Research Council, "Public-Sector Bargaining and Strikes", *Gov't Employee Rel. Rep.* No. 676, at F-1 (Sept. 27, 1976); T. at 153-64. Indeed, as one scholar has specifically remarked on the situation in Michigan's public schools,

> [t]eacher bargaining units have been in the forefront of public employee groups in using the strike weapon to enforce their demands. An average of 4.7 percent of the school districts have faced teacher withdrawal of services each year since 1967. The high occurred when teachers in 9.6 percent of the school districts were on strike at some time during the 1973-74 school year.

Kornbluth, "Public Schools – Multi-Unit Common Bargaining Agents: A Next Phase in Teacher-School Board Bargaining in Michigan", 27 *Lab. L.J.* 520, 521 (1976).

Appellees have *not even attempted* to demonstrate how compelling the Teachers to support the Union could possibly

improve their performance as instructors or the Detroit school system as a vehicle of sound public education. Such being the case, there is no rational way Appellees can claim *Letter Carriers* as support for their position.

C.

In striking down patronage dismissals despite the weighty constitutional considerations favoring them, *Elrod v. Burns* is conclusive authority in favor of the Teachers, for *no* valid governmental interest has been advanced as justification for the abridgment of the Teachers' rights.

Late last term, this Court decided *Elrod v. Burns*, 96 S. Ct. 2673 (1976), in the way that in our main brief we said would establish the Teachers' case as an *a fortiori* one. T. at 39. The Court held that it was unconstitutional for an Illinois sheriff to impose as a condition of continued employment in his department a requirement that existing (nontenured) employees "pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, *contribute a portion of their wages to the Party*, *or* obtain the sponsorship of a member of the Party, usually at the price of *one* of the first three alternatives". 96 S. Ct. at 2681 (plurality opinion) (emphasis supplied).

The Court held that each of the foregoing requirements, *including the requirement of financial support to the Democratic Party*, infringed the associational, political, and speech-rights of the employees involved. We contend here similarly that compelling the Teachers financially to support the Union violates their associational, political, and speech-rights. Like the Union in the present case, the sheriff in *Elrod* sought to justify his action by contending that "[t]he party organization makes a democratic government work and charges a price for its service". *Id.* at 2687 (footnote

omitted). But the Court found this contention unpersuasive. Although it saw some value to the democratic process in patronage dismissals, the Court considered that value far outweighed by their tendency to impair "the associational and speech freedoms which are essential to a meaningful system of democratic government". *Id.* at 2688. In this case, we earnestly contend that no comparable value is served by compelling the Teachers to contribute financial support to the Union, and that therefore this is a stronger case for the Teachers than *Elrod* was for the sheriff's subordinates.

Elrod uncannily recapitulates every important phase of this case. Just as the Union argues here that the Michigan PERA's invasion of the Teachers' rights is justified by the needs of the Union if it is to carry out its "duty of fair representation", so too did the sheriff in *Elrod* contend that forcing adherence to the Democratic Party, though an infringement of free association, was justified because it strengthened the Party. Speaking for the plurality, Justice Brennan rejected this rationalization. "In the instant case", he said, "care must be taken not to confuse the interests of partisan organizations with governmental interests". As justification for incidental invasions of First-Amendment rights, Justice Brennan concluded, "[o]nly the latter will suffice". *Id.* at 2684.

We have already noted how *Elrod* confirms our conception of the relationship between *Letter Carriers* and the unconstitutional-conditions principle. *See* Part IV.B., *supra* p. 34. The cases establishing this principle themselves emphasized that the civil rights of government employees could never serve as a cover for inefficiency or betrayal of their governmental responsibilities. T. at 31-34. Now, in *Elrod*, the Court has reaffirmed its conviction that while in the pursuit of bona-fide job-related requirements government may incidentally, and to the most limited possible degree, restrict constitutional rights, it may never directly invade such rights, as Michigan has done

in this case, without a showing that the invasion serves a supremely powerful, overriding, governmental purpose.

Elrod also underlines the unique character of public employment which renders *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *International Association of Machinists v. Street*, 367 U.S. 740 (1961), irrelevant to this case. In *Street* the Court considered several possible remedies to safeguard the *statutory* right of dissenting railway employees to be free from coerced financial support of union political activities. Injunctions against the enforcement of the union-shop agreement and against all expenditures of union funds for political purposes were rejected, the former because it might interfere with the union's performance of its statutory functions and duties under the Railway Labor Act, the latter because it might work a restraint on the union's First-Amendment interest in publicizing its views on political candidates and programs. 367 U.S. at 771-73. But in enjoining patronage dismissals in *Elrod*, this Court held that subordination of the group First-Amendment interest in patronage to "the core interests of individual belief and association" was "mandated by the First Amendment" precisely because of the public-employment context:

> Since patronage dismissals fall within the category of political campaigning and management, this conclusion irresistably flows from *Mitchell* and *Letter Carriers*. For if the First Amendment did not place individual belief and association above political campaigning and management, *at least in the setting of public employment*, the restraints on those latter activities could not have been judged permissible in *Mitchell* and *Letter Carriers*.

96 S.Ct. at 2688-89 (plurality opinion) (emphasis supplied). That the uniqueness of public employment was key to this holding is emphasized by Justice Brennan's note that the relative balancing of conflicting First-Amendment interests "in the setting of public employment * * * does not necessarily extend to other contexts". *Id.* at 2689 n.27.

We shall have more to say about *Elrod* later. For the present it is enough if we repeat that two cases more alike in principle than this and *Elrod* can scarcely be imagined; that *Elrod* obviously demonstrates the continued strength of the unconstitutional-conditions principle, upon which the Teachers rest their case here; and that in view of these two points, Appellees' absolute omission of any reference to it must be regarded as a tacit admission that they cannot think of any way to refute our contention that the unconstitutional-conditions principle requires this Court to decide in favor of the Teachers.

V.

While essentially conceding that the PERA agency-shop overbroadly infringes the Teachers' First- and Fourteenth-Amendment rights, Appellees fail to establish, to suggest, or even to acknowledge their ultimate burden to prove, in what way the infringement serves a compelling governmental interest; they demonstrate only that it serves a significant Union interest.

In our main brief, we showed that, even if this case were ruled by the "balancing" rather than the *per se* test, Appellees would have the burden to demonstrate with clear and convincing proof that the agency-shop serves some compelling state interest by the means least-restrictive of the Teachers' First-and Fourteenth-Amendment freedoms. And we pointed out that they have not carried, or even attempted to carry, this heavy burden of proof. T. at 115-47.

What Appellees and the Amici have done, as we predicted, is to retreat behind a smokescreen of arguments based upon the Union's status as an exclusive representative. *See* T. at 101-02. We are told, for example, that the constitutionality of exclusive representation (in both the private and the public sectors) has been repeatedly "recognized", "affirmed", "approved", or "upheld". U. at 41 & n.33; N. at 9, 31, 40-41.

That exclusive representation showers "benefits" on public employees, including the Teachers. U. at 29-31; N. at 11-16; X. at 45-50. That these "benefits" justify imposing the agency-shop in order to eliminate so-called "free riders". U. at 32-35; N. at 11-16; X. at 49-50. And that, all in all, the Union is doing nothing more than any other "government": namely, "taxing" those whom it "represents". U. at 21-23, 39; N. at 13; X. at 48-50 n.30, 52-53 n.33.

In our main brief, we recognized that the exclusive-representation device is not immediately in issue in this appeal – but that, none the less, this Court should consider carefully the consequences of relentessly extending the logic of that device as has Michigan in the agency-shop. T. at 148-50. We did not argue, however, that, because the exclusive-representation device *may* itself be unconstitutional, therefore the agency-shop *is* unconstitutional. *See* T. at 101-02. *That* sort of *non sequitur* we left for Appellees and the Amici to advance (as they have) in the argument that, because the exclusive-representation device *might* be valid, therefore this Court *need not inquire at all* into the unconstitutionality of the agency-shop. And, since they have adopted this approach of avoiding and obfuscating the real constitutional issues raised here, we feel it incumbent upon ourselves, in this final Part of our reply, briefly to sweep away some of the mystery which has long insulated exclusive representation from disinterested scrutiny.

A.

Contrary to Appellees' claims, this Court has never passed on the constitutionality of exclusive representation in public-sector, or even private-sector, employment.

Appellees and their Amici no doubt wish the history of exclusive representation were other than it is. For, contrary to their imaginary descriptions of its legal evolution, exclusive

representation has *never* received the imprimatur of this Court, either in public- or private-sector employment. Indeed, no decision of this Court has given the device even a superficial, let alone a searching, constitutional examination. Rather, when the constitutionality of the National Labor Relations Act was first in issue, the Labor Board selected its test cases so as "intentionally [to] avoi[d] presenting the Court with the 'touchy' and more doubtful questio[n]" of exclusive representation. 1 J.A. Gross, *The Making of the National Labor Relations Board* 187 (1974).

Thus, when in *NLRB v. Jones & Laughlin Steel Corp.* an employer challenged that Act on various constitutional theories, the Court *avoided* the issue of exclusive representation by interpreting the bargaining scheme of §9(a) of the Act as "not prevent[ing] the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ". 301 U.S. 1, 45 (1937) (footnote omitted). Similarly, in a contemporaneous employer challenge to the Railway Labor Act, the Court held that the bargaining scheme of that Act also did *not* provide for absolute exclusive representation. *Virginian Ry. v. System Federation No. 40,* 300 U.S. 515, 548-49 (1937).

Seven years later, *in cases raising only issues of statutory construction,* the Court re-interpreted these Acts so as to preclude individual contracts between private-sector employers and their employees. *J.I. Case Co. v. NLRB,* 321 U.S. 332, 334-39 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the issue of constitutionality raised in *Jones & Laughlin* and *Virginian Ry.*, although the statutory constructions adopted in the latter cases formed the necessary predicates for their constitutional holdings. *E.g.*, Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 754, 789-91 (1940). The contemporaneous decision in *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), also failed to pass upon the

constitutionality of exclusive representation. For there, the Court created the "duty of fair representation" in order to *avoid* serious questions of due process and equal protection. *Id.* at 198. And, since 1944, no other case has arisen (before this term) in which the constitutionality of exclusive representation was implicated.[5]

Of course, we do not suggest here that this history necessarily indicates the unconstitutionality of exclusive representation in private-sector employment. Since *private* employers could condition employment on exclusive representation at common law, the inclusion of that device in the National Labor Relations and Railway Labor Acts raises difficult questions of state-action which must await a case other than this for discussion, let alone decision. Here, after all, the context is one of *public* employment, in which private-sector analogies and precedents have little weight; and in which exclusive representation is not directly in issue. None the less, we are not precluded from suggesting that this private-sector history certainly does not support any notion that the constitutionality of exclusive representation in public employment, with its special restraints on public employers, is "settled" – indeed, quite the opposite.[6] And, if so, then this

[5] As we pointed out in our main brief, aspects of the unconstitutionality of exclusive representation in public-sector employment are clearly raised in the pending case City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm'n, *prob. juris. noted,* 96 S. Ct. 1408 (1976). *See* T. at 102, 159-60.

[6] *See* Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976), wherein it was held that Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956), does not foreclose a challenge by public employees to the federal constitutionality of the Minnesota Public Employee Relations Act's exclusive-representation scheme – *both* because *Hanson* "did not resolve the validity of such a scheme", *and* because

> *Hanson* was rendered in a private rather than a public sector collective bargaining context. Collective bargaining in public employment has been considered different from bargaining in private employment.

Knight, 535 F.2d at 471.

Court can give little credence to the argument that the existence of exclusive representation *strengthens* the PERA agency-shop. We submit now, as we did in our main brief, that that existence could caution this Court *even more searchingly* to investigate the constitutional infirmities of the agency-shop, so as not unnecessarily to extend a device now the subject of mounting criticism as incompatible with our social and political system.[7]

B.

Since exclusive-representative status is a special privilege redounding to the benefit of the Union, enhancing that status through the agency-shop at the expense of the Teachers' First- and Fourteenth-Amendment rights has no rational relationship to any compelling governmental interest.

Appellees and the NEA invoke mythology, rather than fact, not only with respect to constitutional history. Again and again they claim that exclusive representation is an "onerous burden" which the Union must bear, and from which the Teachers' reap ever-increasing "benefits". In their brief, Appellees tediously repeat how the Union "*must*" do this and

[7] *See* Vieira, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 *Wake Forest L. Rev.* 515 (1976). Exclusive representation in the private sector has not been immune from recent searching critiques, either. Shaffer, "Some Alternatives to Existing Labor Policies", 27 *Lab. L.J.* 370, 371-76 (1976); Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?", 123 *U. Pa. L. Rev.* 897 (1975). Significantly, Mr. Justice Douglas and the Chief Justice suggested in their dissent from the denial of certiorari in Buckley v. American Fed'n of Television & Radio Artists, 419 U.S. 1093, 1095 (1974), that it was the *coupling* of "congressional permissiveness towards union shop agreements * * * with the NLRA's 'exclusivity' principle" that raised substantial questions about the incompatibility of private-sector union-dues requirements with First-Amendment freedoms.

"*must*" do that. U. at 28. What Appellees and the Amicus do not mention, however, is that the status of the Teachers' exclusive representative was not thrust upon an unwilling Union by the State of Michigan, by the Board, or (least of all) by the Teachers. Rather, the Union avidly sought out that status.[8]

Indeed, teacher-unions such as the American Federation of Teachers and the National Education Association consider exclusive representation such an "oppressive duty" that they struggle violently against each other to expose themselves to it! For example, an article in *U.S. News & World Report*, Apr. 5, 1976, at 90, reports the existence of "A Teachers' War That's Costing Millions" between the AFT and the NEA. "Stakes are high", the magazine notes, "in a battle raging between the two teachers' unions. The real struggle is for power, not necessarily for better education". And on this organizing battle alone, *U.S. News* says, the AFT admits to "spend[ing] close to *30 million dollars* a year". (Emphasis supplied.) In the light of these notorious facts, to say (as do Appellees and the NEA) that it is "only fair" for the state to compel the Teachers to finance the Union's costly activities as an exclusive representative, is an impermissible distortion of the truth.

If the truth be told, exclusive representation is, not a duty, but a special privilege after which unions lust. And a privilege which, in the nature of things, necessarily imposes a corresponding *duty* and *incapacity* on nonunion employees:

[8] Speaking of the Public Employment Relations Act which established exclusive representation as the rule in Michigan public employment, Appellees boasted to the Court of Appeals:

> It is a matter of common knowledge that the enactment of that statute resulted in part from the legislative activities of school teachers and their organizations. It is a matter of equal knowledge that the preservation of that Act has depended in part upon vigilant legislative action by the same groups.

R., Brief of Defendants-Appellees, Mich. Ct. App., Jul. 19, 1974, at 25.

namely, the duty to acquiesce in an unwanted private organization as one's "representative"; and the incapacity to make one's own employment arrangements. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 200 (1944). Yet, after burdening *the Teachers* with this duty and incapacity for *its own* advantage, the Union then advances a further claim to compensation for extending and administering the original insult to their common-law and constitutional right to contract for themselves! To be sure, Appellees and the Amici rush forward with two pat rationalizations for this claim; but neither can withstand analysis.

On the one hand, they argue that "labor stability" in the public sector demands that nonunion employees be required to finance their exclusive representatives, lest the unions become "unnecessarily militant". U. at 33; N. at 36. We have already dealt in our main brief with the real meaning of this "labor-peace" theory, and its incompetence as a life-boat for Appellees' sinking case. T. at 137-47. Here we need only add that, even if the theory were admissible as a matter of law, as a matter of fact Appellees have introduced *no evidence* in the courts below as to the "stabilizing" effect of the agency-shop on public-sector labor relations. For instance, no comparisons are before this Court as to the number of strikes and other forms of work stoppages in states with public-sector agency-shops, as opposed to states without them. The Teachers, conversely, have pointed out that not only irrefutable statistics but also the logic of compulsory public-sector unionism indicate that the agency-shop contributes to more dangerously effective union *militancy*, not to "labor peace". T. at 120-25, 176-86. If "labor peace" is relevant here, then, it supports the Teachers' position, not Appellees'.

On the other hand, Appellees and the Amici stress the "injustice" of permitting the Teachers to reap "benefits" from the Union's representation, while remaining "free riders". U. at 32-35; N. at 37; X. at 45-46. As we have just shown, to what extent the Teachers *are* "free riders" when they "gain" Union representation only at the incalculable cost of losing

their own freedom of self-determination in employment, escapes us. But even leaving this problem aside, we can see no merit in the "free-rider" thesis for four reasons:

First, there is no rule of constitutional jurisprudence that either governments or private parties acting under color of state law can deprive dissenters of First- and Fourteenth-Amendment rights if they undertake to pay "compensation" for those abridgments. T. at 97-98. Instead, the essence of all this Court's teaching on the subject is that these rights are so precious, that their loss, "for even minimal periods of time, unquestionably constitutes *irreparable* injury". *Elrod v. Burns*, 96 S. Ct. 2673, 2690 (1976) (opinion of Brennan, J.) (emphasis supplied). First-Amendment rights, simply put, are beyond limitation on the basis of any "free-rider" theory. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Marsh v. Alabama* 326 U.S. 501, 510 (1946) (Frankfurter, J., concurring).

Second, there is *no evidence* in the record linking representation by the Union, according to some scientifically demonstrable cause-and-effect relationship, to special benefits enjoyed by the Teachers. That such evidence cannot be brought forward, and that such a relationship cannot be established, we strongly believe. *See, e.g.*, W.W. Brown & C.C. Stone, *An Empirical Analysis of the Impact of Collective Bargaining On Faculty Salary, Compensation, and Promotions in Higher Education* 23 (Ass'n of Cal. State Univ. Profs. 1976) (no demonstrable special benefit from public-sector bargaining by AFT, NEA, or NEA-AFT unions); Bradley, "Involuntary Participation in Unionism", in *Labor Unions and Public Policy* 47 (Am. Enterprise Inst. 1958) ("union-benefit" doctrine epistemologically unprovable); *cf.* P.D. Bradley, *Constitutional Limits to Union Power* (Council on Am. Affairs 1976). But in any event, Appellees and the Amici do not even bother to suggest how they might bring forward clear and convincing proofs of such a relationship between union representation and special benefits. Rather, they rely exclusively on the technique of *ipse dixit* to "establish" what

they themselves repeatedly imply are the constitutional facts the *demonstrated* (not merely imagined) existence of which is *absolutely vital* to their own case. *Ipse dixit*, however, is not enough where fundamental constitutional liberties are at stake. *See* T. at 117-19.

Third, the "benefit" argument begs the First-Amendment question in this case. The "benefit" compulsory unionism provides the Teachers through the PERA agency-shop is not, as Amici AFL-CIO and UAW suggest, a "neutral", "economic" service such as workmen's compensation or liability insurance. *Pace* X. at 40-43. Rather, it is pricisely the "benefit" (whatever that may be to dissenters) *of participating indirectly in the associational activity known as unionism.* Collective bargaining through the exclusive-representation device is the embodiment, in statute form, of the ideology of trade unionism. *E.g., Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346 (1944). Therefore, to the extent that the Teachers have been required to acquiesce in the Union as their exclusive representative, and to suffer their terms and conditions of employment to be fixed through collective bargaining (rather than individual contract), their First- and Fourteenth-Amendment rights to self-determination in thought and association have been grievously abridged. The agency-shop is a further invasion of their liberties, an even more direct and unjustifiable ligature binding them to the Union through forced financial support of its *inherently associational* activities. Therefore, to the extent the Teachers receive this spurious "benefit", their freedom of association has been denied, *by hypothesis.* For the "benefit" *is* the constitutional violation! Obviously, then, the "benefit" cannot be proferred as the "justification" for denying the Teachers' First-Amendment rights. *The denial cannot logically justify itself.*

And not only logic, but also consequences, should induce this Court to reject out of hand the Amici's analogy of association with trade unions to patronage of insurance companies and other corporations. Surely the Amici must consider

Appellees' case desperate indeed to excogitate a comparison so far-fetched, and so at variance with everything economists, social scientists, historians, courts, *and especially unions themselves* have said about the labor movement from its inception. Who, besides the Amici here, has ever seriously argued that trade unions engage in activities not essentially and inherently different from those of business corporations generally? Indeed, the opposite presumption explains why courts have long protected the freedom to associate with unions under the First and Fourteenth Amendments. *See* T. at 35-38. But if, as the Amici claim, the "services" unions provide to members and (as here) force upon nonmembers are *constitutionally indistinguishable* from the transactions which corporations have with their customers, then it must follow that the freedom of corporations to provide various business services to consumers is a freedom protected by the First and Fourteenth Amendments. And if this is true, then every state regulation of corporate activity must be tested, not by the traditional "rational-basis" test, but by the strict "compelling-state-interest" and "least-restrictive-alternative" tests. Thus, to find for Appellees under the theory advanced by the Amici, this Court must (at least implicitly) overrule all of its prior decisions sustaining state regulation of corporate activity under the "rational-basis" test – as, for instance, *Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-67 (1973). But merely to state such a revolutionary consequence is to expose the defects of the Amici's argument.

Conversely, if this Court agrees with the Teachers in their analysis of *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), no such extreme result obtains. Unionism, *for voluntary members*, can remain within the special, strict preserve of First-Amendment constitutional jurisprudence; and state regulation of corporate activity can remain within the less-demanding domain of the "rational-basis" test. For if, as we suggest, *Hanson* merely permitted private-sector unions and employers to continue to exercise their traditional

common-law contractual privileges, then the congressional decision to override state "right-to-work" laws in the Railway Labor Act needed to satisfy *only* the "rational-basis" test, even where nonunion employees were concerned. Only if one mistakenly sees *Hanson* as involving a "state-action" problem of First-Amendment magnitude, but somehow not demanding application of the "compelling-state-interest" and "least-restrictive-alternative" tests, is it necessary to grope for the kind of jerry-built rationalization that the Amici advance, and the adoption of which must lead this Court deeper and deeper into a thicket of unresolvable constitutional contradictions and anomalies.

Fourth and last, the "benefit" argument also (and revealingly) neglects to deal with the question of how the agency-shop affects the *public* interest – ultimately, the interest which Appellees must demonstrate is served by compulsory unionism in Michigan. We have already outlined the many ways in which the agency-shop subverts the real public interests at stake in this case, as part of our anticipatory refutation of the argument that the agency-shop serves some compelling state interest. T. at 147-86. Appellees and their Amici, however, have chosen not to join issue on these matters.

We should add one final note. In our main brief, we pointed out that this Court has long recognized two separate tests in First-Amendment jurisprudence, the *per se* and the "balancing" tests. T. at 81-84. And we argued that, because the PERA agency-shop permits Appellees to control the *content* of the Teachers' speech and associations *as such,* it comes within that class of "direct" infringements which are, in literal constitutional terms, "abridgments" of First-Amendment rights – and, therefore, are unconstitutional on their face, no matter what governmental interests they may be argued to serve. T. at 85-99. Moreover, we demonstrated that, even if the agency-shop were viewed as merely an "indirect" impingement upon the Teachers' fundamental rights, and

therefore subject only to the "balancing test", none the less Appellees had not met (or even attempted to meet) the requirements of that test in the courts below. T. at 115-47.

Since our main brief was written, this Court has once again endorsed the analysis of First-Amendment problems which we employed. *See Elrod v. Burns,* 96 S. Ct. 2673, 2684-85 & n.17 (1976) (opinion of Brennan, J.), *and especially* its emphasis of the "speech"-"conduct" dichotomy explained in *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968), upon which decision the Teachers strongly rely. *See* T. at 81-82. *Accord, Buckley v. Valeo,* 96 S. Ct. 612, 633-34 (1976). Notwithstanding, Appellees remain eloquently silent on these matters. They make no attempt to show that the agency-shop is *not* a prior restraint upon the Teachers' First- and Fourteenth-Amendment rights – and, therefore, necessarily unconstitutional *per se* under this Court's precedents. *See* T. at 90-93. They make no attempt to show that the agency-shop is not a *direct* limitation of the Teachers' freedom of self-determination – and, therefore, necessarily unconstitutional *per se* as a matter of the logic of the Bill of Rights, as well as the authority of leading precedents. *See* T. at 94-99. And they make no attempt to satisfy the "balancing test", or even to show why the decision of the Michigan Court of Appeals has not precluded the possibility that they can satisfy that test. *See* T. at 127, 207-10.

In short, by their silence Appellees have conceded that, if any test more stringent than the "rational-basis" test rules this case, the Teachers must prevail. But since, as we demonstrated in Part I.A., *supra* p. 6, Appellees have also conceded that the PERA agency-shop *does* violate the Teachers' First-Amendment rights *and therefore cannot be judged simply by the "rational-basis" test,* it follows that Appellees have admitted that they can advance *no* rational case for the agency-shop.

C.

Appellees' analogy of agency-fees to "taxes" demonstrates how dangerously far Michigan has allowed the exclusive-representation device to intrude on governmental sovereignty, as well as on individual freedom.

What Appellees have done, however, is to provide further support (if any more were needed) for one part of the Teachers' public-interest argument – to wit, that reinforcing the exclusive-representation device with the agency-shop unnecessarily endangers governmental sovereignty. T. at 176-86. In our main brief we suggested that one of the long-term effects of the agency-shop would be to strengthen public-sector unions as rival claimants to sovereignty in the states of this nation. The Appellees have not criticized our observation; rather, their own arguments point up its cogency.

In their attempt to defend the agency-shop, Appellees claim that,

> [w]hen Congress in the [National Labor Relations and Railway Labor Acts[1] adopted *employee self-government* in labor relations, *and approved pro-rata taxation for its costs, it was replicating the principle long operative at every level of our governmental systems.* A citizen, so long as he remains a member of the community must pay his share of its governance costs, local state and federal. His personal agreement with the expenditures of taxes is not a condition of his duty to pay.

U. at 21-22 (emphasis added). We need not explain at length that, when Congress *permitted* certain types of "union-security" agreements in private-sector employment, it certainly did not infuse private employers and unions with any authority to *tax* nonunion employees; Congress merely allowed those parties to continue to exercise a *common-law contractual privilege* they enjoyed long before it undertook to regulate labor relations. But when the State of Michigan enacted the PERA agency-shop, it delegated to public-sector

unions and employers a power theretofore unknown. *See Smigel v. Southgate Community School District*, 388 Mich. 531, 539-40, 202 N.W.2d 305, 306-07 (1972). In the public sector, then, Appellees are correct: the agency-shop does (as they say) "replicate" taxation.

But what profound constitutional issue this "replication" raises, Appellees do not say. We, however, shall. It raises the issue of whether a state government may constitutionally delegate a portion of its most fundamental sovereign power – the power to tax – to a private organization, under circumstances in which: (i) that delegation is unconfined by any meaningful standards; (ii) its exercise is unreviewed by any state authority; and (iii) its inevitable effect is to alienate the loyalties of those public-employee "taxpayers" from the government to the union. T. at 125-27. It raises the issue, in short, of whether a government under our constitutional system may "share" some portion of its sovereignty with private organizations bent upon the control of the system of public education in this country.

We have no doubt that, for public-sector unions such as the AFT and NEA, the agency-shop is merely the first step in a gradual, but inexorable process of eroding governmental – and therefore *popular* – control over our schools. We have said as much, and quoted authorities to that effect, in our main brief. T. at 161-64. And, of the parties before the Court, we are not alone in this view. In its Amicus brief, the NEA is careful to maintain silence with respect to the challenge which the agency-shop poses to governmental sovereignty; indeed, the *National League of Cities* and *Letter Carriers* cases receive no mention at all. But in its general propaganda, the NEA is more vocal. The *National League of Cities* decision, warns NEA President John Ryor,

> strikes at the very core of the power of Congress to act on a federal collective bargaining bill for state and local government employees, including teachers and faculty.
>
> We've got some things to say about this decision and our course for the future. And I hope those who would

> destroy the rights of public employees are paying attention because they have a choice to make. They can work with us to establish those rights and opportunities that are basic to decency in the public sector – *or* they can continue to oppose us and we will establish those rights anyway, *no matter what it takes.*
>
> * * * * *
>
> The message I want the League of Cities and the other champions of the square wheel to hear and to understand is that* * * [w]e are not cowed by adversity. We are angered and strengthened by it.

NEA Advocate, Sept. 1976, at 7 (emphasis retained).

The lines of conflict are thus drawn – between public sector teacher-unions on one side, and government responsive to the people on the other, with nonunion public employees such as the Teachers caught helplessly in the middle. This appeal may be couched in terms of the First- and Fourteenth-Amendment rights of a few Detroit public-school teachers. But as the Framers of our Constitution so wisely foresaw, the defense of those freedoms will best defend as well the public interest of all citizens in a government responsive to, and controlled by, the people as a whole.

CONCLUSION

This Court should reverse the decision of the Michigan Court of Appeals, and grant the relief requested on pp. 214-16 of the Teachers' main brief.

Respectfully submitted,

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